

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

## WEBB EQUIPMENT CO., INC.,

Plaintiff,

V.

AUTO OWNERS INSURANCE COMPANY, INC., a foreign corporation, and SOUTHERN-OWNERS INSURANCE COMPANY, INC., a foreign corporation,

## Defendants.

Case No. C10-5138 RBL

ORDER GRANTING PLAINTIFF'S  
MOTION FOR REMAND TO STATE  
COURT

This matter comes before the Court on Plaintiff's motion for remand to state court pursuant to 28 U.S.C. § 1447(c). The Court has reviewed the pleadings and record herein, is fully informed and GRANTS the motion to remand to Thurston County Superior Court.

## Introduction and Background

On November 3, 2009, Webb Equipment, a Florida corporation, filed suit against its insurer, Southern-Owners, and its parent company, Auto-Owners, in Thurston County Superior Court (Cause No. 09-20-02626-0) for breach of contract, bad faith and Washington Consumer Protection Act violations related to the denial of commercial general liability insurance coverage for Webb for

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1 claims relating to a work-site injury that occurred in Washington State. Webb's complaint also  
2 included a request for declaratory judgment that Webb is entitled to a defense and indemnity under  
3 the terms of the insurance policy.

4 On November 30, 2009, Webb served the Summons, Complaint, and Interrogatories and  
5 Requests for Production on both Auto-Owners and Southern-Owners through service on the  
6 Insurance Commissioner of the State of Washington. Southern-Owners is a Michigan corporation  
7 and a subsidy of Defendant Auto-Owners, which is also a Michigan corporation. Southern-Owners  
8 issues policies of insurance only in Florida to insureds residing in Florida. The parent corporation,  
9 Auto-Owners, is an authorized Washington insurer subject to service on the Insurance  
10 Commissioner.

11 Counsel for Auto-Owners and Southern-Owners filed a Notice of Appearance on January  
12 4, 2010. On January 10, 2010, counsel for Auto-Owners and Southern-Owners requested additional  
13 time to prepare an Answer to Webb's Complaint and responses to Webb's discovery requests. Webb  
14 agreed to extend the deadline until January 28, 2010.

15 On January 28, 2010, instead of answering the Complaint or providing discovery  
16 responses, Southern-Owners filed a motion to dismiss based on insufficiency of service and lack of  
17 personal jurisdiction. On the same date, Auto-Owners filed a motion for summary judgment on the  
18 basis that it did not issue the policy at issue.

19 On February 16, 2010, Webb served the Summons and Complaint and discovery requests on  
20 the Chief Financial Officer of the Florida Department of Financial Service who forwarded the  
21 documents to Southern-Owners' designated agent on February 18, 2010.

22 Despite several conferences, the parties could not resolve ongoing discovery disputes and  
23 Webb ultimately filed a motion to compel. In response, Auto-Owners and Southern-Owners re-  
24 noted their respective dispositive motions for May 21, 2010.

25 On the date Auto-Owners' response to Webb's Motion to Compel was due, Auto-Owners  
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1 and Southern-Owners gave notice of their removal of this action to the U.S. District Court for the  
2 Western District of Washington.

3 In their Notice of Removal filed on March 3, 2010, Auto-Owners and Southern-Owners  
4 confirmed that at the time Webb filed its Complaint in November of 2009, diversity of citizenship  
5 did not exist between Southern-Owners, an insurance company incorporated in Michigan that  
6 sells insurance policies exclusively to Florida residents, and Webb, a Florida corporation.  
7 However, Auto-Owners and Southern-Owners argued that the matter recently became removable  
8 because under the "nerve-center" test adopted by the United States Supreme Court in Hertz Corp. v.  
9 Friend, 130 S. Ct. 1181 (2010), Auto-Owners and Southern-Owners are now considered citizens of  
10 Michigan and are thus diverse from Webb. In response, Plaintiff filed the present motion for  
11 remand to the state court.

12 **Standards for Remand to State Court**

13 The removal statute, 28 U.S.C. § 1441, provides that "any civil action brought in a State  
14 court of which the district courts of the United States have original jurisdiction, may be removed by  
15 the defendant or defendants, to the district court of the United States for any district ... where such  
16 action is pending." 28 U.S.C. § 1441(a). One instance in which the district courts of the United  
17 States have "original jurisdiction" is where there is complete diversity between the parties and the  
18 amount in controversy exceeds \$75,000. 28 U.S.C. § 1332(a)(1). The proper procedure for  
19 challenging removal to federal court is a motion to remand. A federal court must order remand if  
20 there is any defect which causes federal jurisdiction to fail, or if there is any defect in the removal  
21 procedure. 28 U.S.C. § 1447(c). The removal statutes are construed restrictively, and any doubts  
22 about removability are resolved in favor of remanding the case to state court. Gaus v. Miles, Inc.,  
23 980 F.2d 564, 566 (9<sup>th</sup> Cir. 1992). On a motion to remand, the removing defendant faces a strong  
24 presumption against removal, and bears the burden of establishing that removal was proper by a  
25 preponderance of evidence. Id. at 567; Sanchez v. Monumental Life Ins. Co., 102 F.3d 398, 403-04  
26

1 (9<sup>th</sup> Cir. 1996).

2 **Standards for Removal**

3 The Defendants acknowledge that this matter was not removable prior to February 23, 2010,  
 4 because under Ninth Circuit authority there was a lack of diversity between the parties prior to the  
 5 Supreme Court's decision in Hertz v. Friend, 130 S. Ct. 1181 (2010).

6 On February 23, 2010, the United States Supreme Court decided Hertz v. Friend, 130 S. Ct.  
 7 1181 (2010). *Hertz* dealt with the proper test for determining corporate citizenship. Under the  
 8 removal statute, a corporation is a citizen of the state where it is incorporated and the state that is its  
 9 "principal place of business." 28 U.S.C. § 1332(c). The Ninth Circuit had held that a corporation's  
 10 principal place of business is the state where the greatest volume of the corporation's business  
 11 activity takes place, not necessarily the location of its administrative headquarters or "nerve center."  
 12 Under the Ninth Circuit test, Southern-Owners is a citizen of Florida and not diverse to Webb  
 13 because Southern-Owners sells insurance exclusively to Florida residents. The Supreme Court in  
 14 *Hertz* abrogated the Ninth Circuit rule and adopted the "nerve center" test.

15 Southern Owners argues that under the removal statute as interpreted by the Supreme Court  
 16 in *Hertz*, Southern-Owners is diverse to Webb because its administrative offices or "nerve center" is  
 17 located in Michigan.

18 Pursuant to 28 U.S.C. §1446(b), a defendant may file a notice of removal in a case as  
 19 follows:

20 The notice of removal of a civil action or proceeding shall be filed within  
 21 thirty days after the receipt by the defendant, through service or otherwise,  
 22 of a copy of the initial pleading setting forth the claim for relief upon which  
 23 such action or proceeding is based, or within thirty days after the service of  
 summons upon the defendant if such initial pleading has then been filed in  
 court and is not required to be served on the defendant, whichever period is  
 shorter.

24 If the case stated by the initial pleading is not removable, a notice of  
 25 removal may be filed within thirty days after receipt by the defendant,  
 through service or otherwise, of a copy of an amended pleading, motion,

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1 order or other paper from which it may first be ascertained that the case is  
2 one which is or has become removable...

3 Under 28 U.S.C. § 1446(b), a case may be removed under two different 30-day windows. The first  
4 requires the notice of removal to be filed “within thirty days after the receipt by the defendant, through  
5 service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action  
6 or proceeding is based.” The second provides that when the “case stated by the initial pleading is not  
7 removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service  
8 or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be  
9 ascertained that the case is one which is or has become removable.”

10 The Defendants concede that at the commencement of this litigation the action was not removable as  
11 there was a lack of complete diversity under existing Ninth Circuit law. It was only after issuance of the  
12 Supreme Court decision in *Hertz* that the potential of removal arose. Thus, the basis for removal must meet  
13 the criteria for subsequent removal. The Supreme Court’s opinion does not appear to meet the statute’s  
14 criteria. The statute requires that the Defendants receive “copy of an amended pleading, motion, order or  
15 other paper from which it can determine that the case is removable.” As a general rule, “other paper” must  
16 be generated within the specific state proceeding which was removed in order to provide grounds for  
17 removal under §1446(b). Rynearson v. Motricty, Inc., 626 F. Supp 1093, 1097 (W.D. Wash. 2009); Hawaii  
18 v. Abbott Laboratories, Inc., 469 F. Supp.2d 842 (D. Hawaii, 2006). Discovery documents, briefing and  
19 deposition testimony all qualify as “other paper.” Id., Native Village v. Exxon Corporation, 23 F.3d 773,  
20 779 (9<sup>th</sup> Cir. 1994); Cantrell v. Great Republic Ins. Co., 873 F.2d 1249, 1255 (9<sup>th</sup> Cir. 1989). The phrase  
21 “other paper” cannot refer to pleadings filed in a separate, distinct case, in which the parties are not the same.  
22 See Phillips v. Allstate Ins. Co., 702 F. Supp. 1466, 1468 (C.D. Cal.1989) (“other paper” under section  
23 1446(b) does not include intervening statutory or case law changes); Johnson v. Trans World Airlines, Inc.,  
24 660 F. Supp. 914, 917 (C.D. Cal. 1987) (right to remove does not emanate from subsequent development of  
25 case law); Coman v. Int’l Playtex, Inc., 713 F. Supp. 1324, 1327 (N.D. Cal. 1989) (new federal law removing  
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1 ability to plead Doe defendants is not "other paper" triggering removal window); Chen v. China Airlines  
 2 Ltd., 713 F. Supp. 1322, 1323 (N.D. Cal. 1989) ("other paper" under section 1446(b) refers to a paper in the  
 3 case). The *Hertz* decision simply does not qualify as the receipt of "other paper" from which removal  
 4 can be ascertained. Thus, removal is improper.

5 Even if the notice of removal was timely, the Court finds it appropriate to remand this  
 6 matter as Defendants have failed to carry their burden of proof establishing diversity jurisdiction.  
 7 The federal removal statute is to be strictly construed against removal and any doubt is resolved in  
 8 favor of remand. Duncan v. Stuetzle, 76 F.3d 1480, 1485 (9<sup>th</sup> Cir. 1996). The burden of  
 9 establishing jurisdiction rests with the party effecting the removal. Emrich v. Touche Ross & Co.,  
 10 846 F.2d 1190, 1195 (9<sup>th</sup> Cir. 1988). Defendant Southern-Owners' mere assertion that its principal  
 11 place of business is Michigan is insufficient to meet the "nerve center" test as adopted by the  
 12 Supreme Court. In *Hertz*, the Supreme Court expressly rejected a suggestion that merely filing a  
 13 form listing the location of a corporation's "principal executive offices" would, without more, be  
 14 sufficient to establish a corporation's "nerve center." Id. at 1195. Here, Southern-Owners failed  
 15 to present any evidence concerning - let alone unequivocally establishing - where its "nerve  
 16 center" is located. See Hertz v. Friend, 130 S. Ct. 1181, 1195 (2010). There is a strong  
 17 presumption against removal and doubts are to be determined in favor of remand. Gaus v. Miles,  
 18 Inc., 980 F.2d 564, 566 (9<sup>th</sup> Cir. 1992). As such, remand is appropriate.

19 **Attorney Fees, Costs and Expenses**

20 Plaintiff seeks an award of attorney fees, costs and expenses under 28 U.S.C. § 1447(c) for  
 21 bringing this motion for remand. 28 U.S.C. § 1447(c) provides in pertinent part: "An order  
 22 remanding the case may require payment of just costs and any actual expenses, including attorney  
 23 fees, incurred as a result of the removal." An award of attorney's fees under § 1447(c) is within the  
 24 broad discretion of the Court. Although bad faith need not be shown, the Court must undertake  
 25 some review of the merits of the removal petition to assess the reasonableness of the attempted  
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1 removal. Moore v. Permanente Med. Group, 981 F.2d 443, 446-47 (9<sup>th</sup> Cir. 1992). Fees and costs  
2 may be awarded under § 1447(c) if the attempted removal was objectively unreasonable. See  
3 Martin v. Franklin Capital Corp., 546 U.S. 132, 141 (2005); Lussier v. Dollar Tree Stores, Inc., 518  
4 F.3d 1062, 1065 (9<sup>th</sup> Cir. 2008). As discussed above, the Court has found the removal at issue  
5 herein was not proper. The Court does not find, however, that Defendants lacked an objectively  
6 reasonable basis for removing. Although Defendants' removal lacked merit, Defendants relied in  
7 good faith upon Hertz v. Friend, 130 S. Ct. 1181, 1195 (2010) to remove the case. Accordingly, the  
8 request for fees, costs and expenses pursuant to 28 U.S.C. § 1447(c) will be denied.

9 **Conclusion**

10 For the stated reasons, Plaintiff's motion is granted and this case is remanded to the  
11 Thurston County Superior Court in Washington from which it was removed. However, Plaintiff's  
12 request for attorney's fees, costs and expenses under 28 U.S.C. § 1447(c) is denied.

13 ACCORDINGLY;

14 IT IS ORDERED:

15 Plaintiff's Motion for Remand [Dkt. # 11] is **GRANTED**. The matter is **REMANDED** to  
16 Thurston County Superior Court. Plaintiff's request for an award of attorney fees, costs and  
17 expenses is **DENIED**.

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20 DATED this 20<sup>th</sup> day of April, 2010.

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22   
RONALD B. LEIGHTON  
23 UNITED STATES DISTRICT JUDGE  
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